Lok Yee Hsun & Ors v Bina Puri Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-02(IM)-1353–09 OF 2020, S-02(IM)-1885–12 OF 2020 AND S-02(1M)-1558–08 OF 2021

HAS ZANAH MEHAT, LEE HENG CHEONG AND CHE MOHD RUZIMA JJCA

30 DECEMBER 2022

Civil Procedure — Res judicata — Different cause of action and issues — Withdrawal of previous fresh suit with liberty to file afresh — Filing of proposed fresh suit — proposed fresh suit was based on new facts and claims — Whether proposed fresh suit caught by res judicata

Companies and Corporation — Powers of liquidator — Whether sanction from liquidator required before filing of suit — Companies Act 2016 s 486(2)

Companies and Corporations — Winding up — Stay of order — Application for stay of winding up order — Whether there were special circumstances — Companies Act 2016 ss 471, 492 & 494 — Rules of Court 2012 O 88 & O 92 r 4

The appellants in the present appeal were the shareholders/contributories of a company known as Likas Bay Precinct Sdn Bhd (in liquidation) ('the company'). The High Court had allowed winding up order ('the WU order') against the company to enforce a Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') award ('said CIPAA Award') for RM16,439,628.24 based on unpaid interim claims in relation to Block B1 and B2 of a construction project ('the project') involving the respondent as the main contractor. The appellants then filed encl 109 to stay the WU order pending disposal of a suit ('the said previous suit') but as the said previous suit was filed during the validity of the WU order, encl 109 was considered defective and dismissed by the court and consequently, the appellants had withdrawn the said previous suit with liberty to file afresh. Subsequently, the appellants filed summons in chamber pursuant to O 88 of the Rules of Court 2012 ('the ROC'), O 92 r 4 of the ROC, and ss 471, 492 and 494 of the Companies Act 2016 ('the CA') for leave to commence a fresh suit against the respondent ('the said proposed fresh suit'), inter alia, to stay all proceedings in relation to the WU order and that the appointed liquidator, Wong Ching Yong ('the liquidator'), to cease further action against the company until disposal of the said proposed fresh suit including any appeals therefrom ('encl 1'). The

learned High Court judge ('the LHCJ') dismissed encl 1 and held that: (a) encl 1 was caught by the doctrine of res judicata and the appellants ought to first file an appeal against encl 109; and (b) the appellants' application for leave to commence a fresh suit was a non-starter as the appellants had failed to seek leave from the liquidator first ('the HC's order'). Aggrieved by the HC's order, the appellants filed the present appeal. The issues raised were: (i) whether sanction was required from the liquidator; (ii) whether issues raised in encl 1 caught by res judicata; and (iii) whether there were special circumstances.

Held, allowing the appellants' appeal and setting aside the HC's order with costs of RM10,000 to the appellants against the respondent subject to allocator fee:

(1) There was no necessity for the appellants to first, apply to the liquidator for leave before commencing the proposed fresh suit because under s 486(2) of the CA, any contributory may apply to court to do so. There was also no such requirement under s 492(1) of the CA, as such, the LHCJ had erred in law by reading such requirement into s 492(1) of the CA. Further, the court agreed with the appellants' contention that the LHCJ failed to consider that in the circumstances of this case, it would be pointless for the appellants to seek such sanction from the liquidator since the overall effect of the leave application would stay all powers of the same liquidator (see paras 17, 19 & 33).

(2) The LHCJ failed to consider that encl 109 was only an application for stay of the said WU order and that there was no challenge mounted against the basis and validity of the judgment in the said CIPAA Award. Thus, to further an appeal to the Court of Appeal against the dismissal of encl 109 would serve no purpose. In addition, it ought to be noted that the withdrawal of the said previous fresh suit was with an express provision that the withdrawal was with liberty to file afresh. This meant that the merits of the same were never considered by the court. Thus, the doctrine of res judicata could not operate against the filing of the said proposed fresh suit (see paras 22–23).

(3) Having perused encl 109 and encl 1, the court found that encl 1 was not caught by the doctrine of res judicata because the proposed fresh suit was based on new and fresh facts and claims in the final account which could not be set up in the CIPAA Award and that the appellants intended to amongst others, claim for damages arising from the unlawful suspension of works by the respondent in the project which were not considered in the CIPAA Award (see para 28).

(4) The court found that that there existed special circumstances for stay in that the proposed fresh suit would refer and rely on new and fresh facts based on the completion of Block B works on 13 October 2016, the

availability of the final accounts and the discovery of tenancy agreement which benefited the respondent's associate company (see para 35).

(5) The court was mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence. In the present appeal, based on the above findings, the court was of the view that the LHCJ made errors in material findings of facts in the appellants' application which warranted appellate intervention (see paras 14–15 & 36).

[Bahasa Malaysia summary

Perayu-perayu dalam rayuan ini adalah pemegang saham/penyumbang sebuah syarikat yang dikenali sebagai Likas Bay Precinct Sdn Bhd (dalam penyelesaian) ('syarikat tersebut'). Mahkamah Tinggi telah membenarkan perintah penggulungan ('perintah WU tersebut') terhadap syarikat tersebut untuk menguatkuasakan award Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('CIPAA') ('Award CIPAA') sebanyak RM16,439,628.24 berdasarkan tuntutan interim yang belum dibayar berhubung dengan Blok B1 dan B2 bagi satu projek pembinaan ('projek tersebut') yang melibatkan responden sebagai kontraktor utama. Perayu-perayu kemudian memfailkan lampiran 109 untuk menangguhkan perintah WU tersebut sementara menunggu pelupusan satu saman ('saman terdahulu tersebut') tetapi memandangkan saman terdahulu tersebut telah difailkan semasa perintah WU tersebut berkuatkuasa, lampiran 109 dianggap cacat dan ditolak oleh mahkamah dan akibatnya, perayu-perayu telah menarik balik saman terdahulu tersebut dengan kebebasan untuk memfailkan semula. Selepas itu, perayu memfailkan saman dalam kamar menurut A 88 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'), A 92 k 4 KKM 2012, dan ss 471, 492 dan 494 Akta Syarikat 2016 ('AS') bagi memohon kebenaran untuk memulakan saman baharu terhadap responden ('saman baharu yang dicadangkan tersebut'), antara lain untuk menangguhkan semua prosiding berhubung dengan perintah WU tersebut dan bahawa penyelesai yang dilantik, Wong Ching Yong ('penyelesai'), untuk menghentikan tindakan selanjutnya terhadap syarikat tersebut sehingga pelupusan saman baharu yang dicadangkan tersebut termasuk apa-apa rayuan daripadanya ('lampiran 1'). Hakim Mahkamah Tinggi yang bijaksana ('HMTB') menolak lampiran 1 dan memutuskan bahawa: (a) lampiran 1 terhalang oleh doktrin res judicata dan perayu-perayu hendaklah terlebih dahulu memfailkan rayuan terhadap lampiran 109; dan (b) permohonan perayu-perayu untuk mendapatkan kebenaran untuk memulakan saman baharu tidak akan berjaya kerana perayu-perayu telah gagal

mendapatkan kebenaran daripada penyelesai terlebih dahulu ('perintah MT'). Terkilan dengan perintah MT tersebut, perayu-perayu memfailkan rayuan ini. Isu-isu yang dibangkitkan ialah: (i) sama ada kebenaran diperlukan daripada penyelesai; (ii) sama ada isu-isu yang dibangkitkan dalam lampiran 1 terhalang oleh res judicata; dan (iii) sama ada terdapat keadaan-keadaan istimewa.

Diputuskan, membenarkan rayuan perayu-perayu dan mengenepikan perintah MT dengan kos sebanyak RM10,000 kepada perayu-perayu terhadap responden tertakluk kepada fi alokatur:

(1) Tidak ada keperluan untuk perayu-perayu terlebih dahulu, memohon kepada penyelesai untuk mendapatkan kebenaran sebelum memulakan saman baharu yang dicadangkan tersebut kerana di bawah s 486(2) AS, mana-mana penyumbang boleh memohon kepada mahkamah untuk berbuat demikian. Juga tiada keperluan sedemikian di bawah s 492(1) AS, oleh itu, HMTB telah terkhilaf dari segi undang-undang dengan membaca keperluan tersebut ke dalam s 492(1) AS. Selanjutnya, mahkamah bersetuju dengan hujahan perayu-perayu bahawa HMTB gagal mempertimbangkan bahawa dalam keadaan kes ini, adalah sia-sia bagi perayu-perayu untuk mendapatkan kebenaran sedemikian daripada penyelesai tersebut kerana kesan keseluruhan permohonan kebenaran tersebut akan menggantung semua kuasa penyelesai tersebut (lihat perenggan 17, 19 & 33).

(2) Hakim Mahkamah Tinggi yang bijaksana gagal menimbangkan bahawa lampiran 109 hanyalah permohonan penangguhan perintah WU tersebut dan bahawa tiada apa-apa cabaran yang dikenakan terhadap asas dan kesahihan penghakiman dalam Award CIPAA tersebut. Oleh itu, tindakan meneruskan rayuan kepada Mahkamah Rayuan terhadap penolakan lampiran 109 tersebut tidak akan memberikan apa-apa kesan. Di samping itu, perlu diambil perhatian bahawa penarikan balik saman baharu tersebut adalah dengan peruntukan nyata bahawa penarikan balik tersebut adalah dengan kebebasan untuk memfailkan semula. Ini bermakna bahawa merit kes tersebut tidak pernah dipertimbangkan oleh mahkamah. Oleh itu, doktrin res judicata tidak terpakai terhadap pemfailan saman baharu yang dicadangkan tersebut (lihat perenggan 22–23).

(3) Setelah meneliti lampiran 109 dan lampiran 1, mahkamah mendapati lampiran 1 tidak terhalang oleh doktrin res judicata kerana saman baharu yang dicadangkan tersebut adalah berdasarkan fakta dan tuntutan baharu dalam akaun akhir yang tidak boleh dibuat dalam Award CIPAA tersebut dan bahawa perayu-perayu bertujuan antara lain, menuntut ganti rugi yang timbul daripada penggantungan kerja yang menyalahi undang-undang oleh responden dalam projek tersebut yang tidak dipertimbangkan dalam Award CIPAA tersebut (lihat perenggan 28).

(4) Mahkamah mendapati bahawa wujud keadaan istimewa untuk penangguhan di mana saman baharu yang dicadangkan tersebut akan merujuk dan bergantung kepada fakta baharu berdasarkan penyiapan kerja Blok B pada 13 Oktober 2016, ketersediaan akaun akhir dan penemuan berkaitan perjanjian penyewaan yang memberi manfaat kepada syarikat sekutu responden (lihat perenggan 35).

(5) Mahkamah mengambil kira peranan terhad mahkamah rayuan berhubung dengan dapatan-dapatan fakta yang dibuat oleh mahkamah perbicaraan. Dalam kes *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, Mahkamah Persekutuan memutuskan bahawa ujian 'insufficient judicial appreciation of evidence' yang diterima pakai oleh Mahkamah Rayuan adalah berhubung dengan proses menentukan sama ada mahkamah perbicaraan telah mencapai keputusan atau dapatan-dapatannya dengan betul berdasarkan undang-undang yang berkaitan dan keterangan yang telah dibuktikan. Dalam rayuan ini, berdasarkan dapatan-dapatan di atas, mahkamah berpendapat bahawa HMTB telah membuat kesilapan dalam dapatan-dapatan fakta yang material dalam permohonan perayu-perayu yang memerlukan campur tangan rayuan (lihat perenggan 14–15 & 36).]

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)
Taman Rimba (Mentakab) Sdn Bhd v Warrior Rubber Products (M) Sdn Bhd & Ors [2017] MLJU 2178, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 243
Companies Act 2016 ss 471, 486(1)(a), (2), 492, 492(1), 493, 494
Rules of Court 2012 O 88, O 92 r 4

Appeal from: Post Company Winding Up Nos BKI-28PW-2/2 of 2020, BKI-28PW-6/5 of 2020 and BKI-28PW-6/5 of 2020 (High Court, Kota Kinabalu)

Cheng Ho Wah @ Roland (Roland Cheng & Co) for the appellants.
Norbert Yapp (Norbert Yapp & Assoc) for the respondent.
Tiong Jia Yi (Szetu & Co) for the liquidator.

Lee Heng Cheong JCA:

INTRODUCTION

[1] The above three appeals namely, Civil Appeal No S-02(IM)-1353–09 of 2020 ('first appeal'), Civil Appeal No S-02(IM)-1885–12 of 2020 (second appeal') and Civil Appeal No S-02(1M)-1558–08 of 2021 ('third appeal') were heard together.

[2] We heard all the three appeals on 25 May 2022 and we unanimously allowed the first appeal. Upon our allowing the first appeal, the appellants in the second and third appeals applied to withdraw the second and third appeals. We then struck out the second and third appeals with no order as to costs.

BACKGROUND

[3] Bina Puri Sdn Bhd, the respondent in the first appeal ('respondent') had on 7 March 2017 filed Companies (Winding up) Petition No BKl-28NCC-11/3 of 2017 ('said petition') against Likas Bay Precinct Sdn Bhd (in liquidation) ('said company') to enforce a Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') award ('said CIPAA award') dated 31 December 2017 for RM16,439,628.24 based on unpaid interim claims in Block B1 and B2 of the project described as 'Cadangan Penyatuan, Pembahagian Tanah dan Pembinaan KOUMS Asrama UMS di atas Lot NT010745, NT0107440 di Kg Numbok, Kuala Menggatal, Sabah (with subsidiary titles to be applied for)' ('said project').

[4] The respondent was the main contractor for Block A and Block B1, B2 of the project. The Block A contract was mutually terminated on 15 December 2015 subject to preparation of the final account. The respondent on 30 March 2016 suspended the said project with 1.40% uncompleted works based on alleged unpaid claims of RM20,244,864.15.

[5] The said company lodged an appeal against the winding up order dated 26 May 2017 ('said WU order') to the Court of Appeal which was dismissed on 17 November 2017. The said company further appealed to the Federal Court (refer to Civil Appeal No 02(f)-81–09 of 2018(S) ('said FC appeal') which was also dismissed on 25 June 2019.

[6] The appellants had earlier filed a notice of motion (encl 109) on 8 August 2019 ('said encl 109'), praying for a stay of the said WU order pending disposal of Suit No BKl-22C-2/7 of 2019 ('said previous fresh suit') which was filed on 22 July 2019 after t he grant of sanction by the DGI on 19 June 2019. As the said encl 109 was defective, it was withdrawn on 21

January 2020 with liberty to file afresh because the said previous fresh suit was filed during the validity of the said WU order.

[7] In the first appeal, the appellants are at all material times the shareholders/contributories of the said company ('appellants').

[8] The first appeal is filed by the appellants against the decision of the learned High Court judge ('LHCJ'), dismissing the appellants' summons in chambers dated 25 February 2020 (encl 1) (the 'said encl 1') made under O 88 and O 92 r 4 of the Rules of Court 2012, ss 471, 492 and 494 of the Companies Act 2016 ('the CA 2016') for leave to commence a fresh suit against the respondent ('said proposed fresh suit'), inter alia, to stay all proceedings in relation to the winding up order dated 26 May 2017 and that the appointed liquidator, Wong Ching Yong ('liquidator'), to cease further action against the said company until disposal of the said proposed fresh suit including any appeals therefrom.

[9] The LHCJ dismissed the appellants' said encl 1. Dissatisfied with the decision of the LHCJ, the appellants filed the first appeal herein.

FINDINGS OF THE HIGH COURT JUDGE

[10] The LHCJ held, inter alia, as follows:

(a) that the said encl 1 is caught by the doctrine of res judicata; and

(b) that the appellants' application for leave to commence a fresh suit is a non-starter as the appellants have failed to seek leave from the liquidator first.

THE APPELLANTS' CONTENTIONS

[11] Before us, the appellants contended, inter alia, as follows:

(a) that the LHCJ erred in fact and law when he held that the application for leave '... first be addressed to the liquidator for sanction ...';

(b) that the LHCJ judge misdirected himself in law and fact when he held that '... the issues have been adjudicated and it is clearly caught by the principle of res judicata ...';

(c) that the LHCJ failed to adequately consider that there was an application by a proposed intervener to intervene in another application by the liquidator for sanction in the form of Summons No BKl-28PW-5/5 of 2020 ('said sanction') in the same High Court to exercise his powers against the said company' assets, properties and income. The LHCJ had earlier directed that the said sanction

application be heard together with the said leave application in his court. However. the learned judge later changed his direction and proceeded to hear the said leave application first. Thus, the LHCJ failed to consider all the relevant circumstances and misdirected himself in law; and

(d) that the learned judge erred in law and fact when he failed to consider all the relevant circumstances of the said leave application for stay of all proceedings by the liquidator pending disposal of the said leave to file a fresh suit to set aside the winding up order dated 26 May 2017 and which in turn will affect the appointment of the same liquidator.

THE LIQUIDATOR'S CONTENTIONS

[12] Before us, the liquidator contended as follows:

(a) the said encl 109 which included an application for stay, was dismissed by the High Court. The appellants did not appeal against the dismissal of the said encl 109;

(b) the appellants in the said encl 109 and in the said encl 1 prayed for the following orders:

(i) for a stay of the winding up order dated 26 May 2017 granted by the court until the disposal of a fresh High Court suit which the appellants is seeking leave to file; and

(ii) for cessation of the liquidator's power granted by the High Court on 6 March 2019 until the disposal of a pending High Court suit.

(c) in respect of the application for leave to file the proposed fresh suit, the appellants should have sought the requisite sanction from the liquidator pursuant to the CA 2016, to file the proposed fresh suit. Since the appellants failed to do so, the application ought to be dismissed;

(d) that the appellants have usurped the function of the liquidator to exercise his discretion whether or not to grant sanction pursuant to s 486(1)(a) of the CA Act 2016; and

(e) that the appellants' application under the said encl 1 in relation to the application for stay and cessation of the liquidator's power, is caught by the doctrine of res judicata.

THE RESPONDENT'S CONTENTIONS

[13] The respondent contended since the appellants failed to file any application to set aside the CIPAA award which has been registered as a valid and subsisting High Court judgment, it is now too late to challenge the CIPAA award, in the form of the fresh suit.

OUR ANALYSIS

[14] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence*. (Emphasis added.)

[15] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[16] Bearing in mind the above principles distilled from the above cases, we will now deal with the appellants' first appeal.

Whether sanction is required from the liquidator

[17] On the issue, that the LHCJ erred in fact and law when he held that the application for leave '... first be addressed to the liquidator for sanction ... ', we are of the considered view that there is no necessity for the appellants to first, apply to the liquidator for leave before commencing the proposed fresh suit as under s 486(2) of the CA 2016, any contributory may apply to court to do so.

[18] Section 486(2) of the CA 2016, reads as follows:

> 486 Powers of liquidator in winding up by Court
>
> (1) ...
>
> (2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section *is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers*. (Emphasis added.)

[19] Further, we are in agreement with the appellants' contention that the LHCJ failed to consider that in the circumstances of this case, it will be pointless for the appellants to seek such sanction from the liquidator since the overall effect of the leave application will stay all powers of the same liquidator.

A RES JUDICATA ISSUE

[20] On the issue that the LHCJ misdirected himself in law and fact when he held that '... the issues have been adjudicated and it is clearly caught by the principle of res judicata ...', we are of the considered opinion that this particular finding of the LHCJ is erroneous and without basis for reasons which will be discussed later.

[21] In the appellants' earlier application in the form of the said encl 109 for stay which was not appealed, the LHCJ erred in law when he held at line 107 p 5 of his grounds of judgment that '... If the Applicants are not satisfied with the outcome of encl 109, the proper recourse would be for the applicants to appeal the matter to the COA ...'.

[22] We are of the considered view that the LHCJ failed to consider that the said encl 109 was only an application for stay of the said WU order and that there was no challenge mounted against the basis and validity of the judgment in the said CIPAA award. Thus, further an appeal to the Court of Appeal against the dismissal of the said encl 109 will serve no purpose.

[23] We find that the LHCJ also erred in law when he held, at line 112 p 5 to line 116 p 6 of his grounds of judgment that '... the cause of action in the fresh suit is similar to the new suit that was withdrawn ... it is also to be noted that the new suit was struck (out) with liberty to file afresh ...'. It is pertinent to note that the withdrawal of the said previous fresh suit was with an express provision that the withdrawal was with liberty to file afresh. This meant that the merits of the same were never considered by the court. Thus, the doctrine of res judicata could not operate against the filing of the said proposed fresh suit.

NATURE OF PROPOSED FRESH SUIT

[24] The basis for the said proposed fresh suit is stated at paras 49(c) and 49(d) of the draft statement of claim annexed to the said encl 1 and it is based on the incentives for early completion amounting to the sum of RM8,799,263. The appellants contended that this sum should be excluded from the said CIPAAA ward obtained by the respondent as the respondent failed to complete the project within 24 months from 1 November 2013 which is 30 October 2015, thus the respondent is not entitled to this sum.

[25] The appellants is claiming the sum of RM52,563,838.68 from the respondent as damages which is computed as follows. The sum of RM38,130,049.72 for Block B1, B2 and RM14,433,788.96 for Block A which the appellants intended to set off against the said CIPAA award. Thus,

the said proposed fresh suit will impeach the said CIPAA award and this in turn will directly affect the basis and validity of the said WU order.

[26] The appellants contended that the said CIPAA award can be only impeached by the said proposed fresh suit and relied on the Federal Court case of *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1

[27] We are in agreement with this contention of the appellants and support can be found in the judgment of Ramly Ali FCJ in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* where he held as follows:

> (1) It is trite that the impeachment action should be by way a fresh action and not in the same action where the impugned earlier judgment was made. The respondents' claim in the present case was by way of a fresh action based on fresh evidence which could not have been obtained at the earlier trial ...

[28] Having perused said encl 109 and the said encl 1 which is the subject matter of this appeal, we find that the said encl 1 is not caught by the doctrine of res judicata as we are of the considered view that the proposed fresh suit is based on new and fresh facts and claims in the final account which could not be set up in the CIPAA award and that the appellant intends to amongst others, claim for damages arising from the unlawful suspension of works by the respondent in Block B which were not also considered in the CIPAA award.

Stay

[29] Section 492 of the CA 2016 states as follows:

> (1) At any time after an order for winding up has been made, the Court may, *on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court* that all proceedings in relation to the winding up of the company ought to be stayed, *make an order staying the winding up of the company for a specified time on such terms and conditions as the Court thinks fit*.
>
> (2) Where the Court makes an order under subsection (1), *the liquidator shall cease to conduct any further action on behalf of the company* from the date of such order. (Emphasis added.)

[30] Section 492 of the CA 2016 is in pari materia with s 243 of the Companies Act 1965 ('the CA 1965') which governs both temporary and permanent stay of the winding up order. Section 243 of the CA 1965 states as follows:

> 243 Power to stay winding up

A (1) At any time after an order for winding up has been made the Court may, *on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.*

B (2) On any such application the Court may, before making an order, *require the liquidator to furnish a report* with respect to any facts or matters which are in his opinion relevant. (Emphasis added.)

C **[31]** It would be useful and pertinent to note the distinction between the s 492 of the CA 2016 and s 243 of the CA 1965 namely:

(a) under the s 243 of the CA 1965, the court has the discretion to require the liquidator to furnish a report before making the stay of the winding up order. No such discretionary requirement existed under s 492 of the
D CA 2016; and

(b) s 243 of the CA 1965 allows for either permanent or temporary stay of the winding up order. In contrast, s 492 of the CA 2016 only allows for temporary stay whereas s 493 of the CA 2016 only allows for permanent
E stay.

[32] The distinction between a permanent stay application under s 243 of the CA 1965 and an interim stay under s 492 of the CA 2016 was further illustrated in *Taman Rimba (Mentakab) Sdn Bhd v Warrior Rubber Products (M)*
F *Sdn Bhd & Ors* [2017] MLJU 2178, where Mohd Nazlan Mohd Ghazali J (as he then was) held as follows:

[33] Thus, *it is unnecessary for instance for the court to insist on, in every stay application, for the liquidator's report* to be produced to show evidence of likelihood of commercial solvency, ... In my view, *the discretion of the court in evaluating the*
G *merits of a stay application otherwise than for a permanent basis ought to be guided by the test of the applicant for stay showing the existence of special circumstances ... (Emphasis added.)*

H **[33]** Section 492(1) of the CA 2016 provided for three separate situations of application for stay by the liquidator, by the creditor and by the contributory. We adopt the view that there is no express requirement for prior application for leave to the liquidator before the contributory such as the appellants herein, can approach the court. Thus, we find that the LHCJ had erred in law by
I reading such requirement into s 492(1) of the CA 2016.

SPECIAL CIRCUMSTANCES

[34] The liquidator contended that there were no special circumstances justifying stay and that the appellants had not complied with the court order dated 10 November 2020 for the surrender of documents.

[35] We are of the considered view that there existed special circumstances for stay in that the proposed fresh suit will refer and rely on new and fresh facts based on the completion of Block B works on 13 October 2016, the availability of the final accounts and the discovery of tenancy agreement which benefited the respondent's associate company.

CONCLUSION

[36] In the light of our above findings, we are of the considered opinion that the LHCJ made errors in material findings of facts in the appellants' application which warranted appellate intervention. We are of the respectful view that there are merits in the appellants' appeal and we unanimously allow the appeal. The order of the High Court dated 10 September 2020 is set aside. Cost of RM10,000 to the appellants against the respondent subject to allocator fee; and no cost is ordered against the liquidator.

[37] In the premises, we grant an order in terms of the said encl 1 as follows:

(a) that leave be granted to Likas Bay Precinct Sdn Bhd (in liquidation) ('said company') to file and serve the fresh suit against the respondent as per the proposed statement of claim in the affidavit in support of the appellants and can be found in encl 4 at pp 152–166 ('said fresh suit') within 14 days from the date of this order;

(b) that all proceedings be stayed in relation to the winding up order dated 26 May 2017 granted to the respondent until after disposal of the said fresh suit in (a) above including any appeals there from, or until such other time as this court shall deem fit; and

(c) that all actions by the private liquidator, Wong Ching Yong, appointed on 6 March 2019 under Originating Summons No BKI-24NCvC-102/10 of 2018 at the request of the respondent be stayed until after disposal of the said fresh suit in (a) above including any appeals there from, or until such other time as this court shall deem fit.

A *Appellants' appeal allowed; HC's order set aside with costs of RM10,000 to appellants against respondent subject to allocator fee.*

Reported by Dzulqarnain Ab Fatar

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